SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 321

OGLE PROTECTION SERVICE, INC., and
JAMES L. OGLE,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ogle Protection Service, Inc., and James L. Ogle pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, insofar as it enforces the decision of the National Labor Relations Board that Petitioners committed unfair labor practices in refusing to sign a collective bargaining agreement with the International Union, United Plant Guard Workers of America, Local 114 and requires the execution of the alleged agreement.

## OPINIONS BELOW

The decision and order of the National Relations Board (Joint Appendix, 504a) is reported at 149 National Labor Relations Board No. 50. The opinion of the Court of Appeals for the Sixth Circuit is reported at ——.

## JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1967. The Jurisdiction of this Court is invoked under U.S.C. Sec. 1254 (1).

## QUESTIONS PRESENTED

With respect to the Judgment of the United States Court of Appeals for the Sixth Circuit upholding the determination of the National Labor Relations Board that Ogle Protection Service, Inc., and International Union, United Plant Guard Workers of America, Local 114 reached agreement on a collective bargaining contract and the Company unlawfully refused to reduce such agreement to a writing, and enforcing the Order of the Board requiring the Company to sign such contract:

Whether the United States Court of Appeals for the Sixth Circuit so far departed from the accepted and usual course of judicial proceedings in that it sanctioned and validated such a departure by the National Labor Relations Board as to call for the exercise of the power of supervision of the United States Supreme Court.

## STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, Title 29, U.S.C. Section 151 *et seq.*, as amended (hereinafter called the Act) are as follows:

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *"

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. * * * (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or

make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

## STATEMENT

It should be noted at the outset that this Petition does not involve the charge of discrimination against union activities under Section 8 (a) (3) of the Act. The National Labor Relations Board determined that Ogle Protection Service, Inc. violated the provisions of Section 8 (a) (3) by discharging two of its employees because of their union activities and ordered the employees' reinstatement with back pay. This determination and order, however, was set aside by the United States Court of Appeals for the Sixth Circuit on the grounds that the record lacked substantial evidence of discharge for union activities, but to the contrary contained substantial evidence of discharge for cause. The Petition herein confines itself solely to the matter of an alleged meeting of the minds between Ogle Protection Service, Inc., hereinafter called the "Company", and the International Union, United Plant Guard Workers of America, Local 114, hereinafter called the "Union", and the subsequent refusal by the Company to embody its terms in a written contract.

The Company is a corporation organized under the laws of the State of Michigan with offices in Detroit, where it is engaged in the business of supplying around-the-clock uniformed watchmen and protection guards to its clients, the great bulk of which are hospitals and other types of non-profit institutions. James L. Ogle is the Company's President and the holder of a majority of its outstanding shares of stock. The Company is engaged in interstate commerce within the meaning of the Act.

Benton Bibrey and Willie England were President and Vice-President, respectively, of the local union, which was first recognized as the bargaining representative of the Company's guards in 1957. The last duly executed written agreement between the parties was due to expire on July 15, 1962. A few days prior thereto the parties agreed by written instrument to extend the latter contract indefinitely or until terminated by a ten days' written notice of either party. Between July and November, 1962, several meetings were held between various representatives of the parties for the purpose of formulating a new contract, without, it is conceded, resulting in any agreement on economic issues. A committee of three of the Company guards, Wolski, Rivers and Lewis, duly elected by the Union rank and file, participated in the negotiations on the Union's side.

Two meetings which, it is contended, resulted in a meeting of minds between the parties, were held in November, 1962. The first of these, which took place on November 2, 1962, however, was undeniably inconclusive despite the Union's attempts to prove the Company's then attorney, David Colman, possessed the requisite authority to conclude a binding contract and that he did in fact at that time, accept, on behalf of the Company, the wage demands of the Union. It is elementary that the authority of an agent

may not be proved by his own words. Ogle had notified the Union in writing that Coleman's previous authority was circumscribed (J.A. 503). Following this notice Colman was called upon merely to assist Ogle in the negotiations while the latter was recuperating from prolonged illness and in the drafting of a suitable contract after the parties reached agreement (J.A. 410, 429-430, 442, 445). In any event Bilbrey hedged on his authoritative statements concerning Colman's alleged authority and admitted that Colman declined to bind the Company on the wage issue in Ogle's absence (J.A. 18-19; see also J.A. 82). This declination on Colman's part could only place the Union on notice that, at best, Colman refused to exercise in full the authority which had supposedly been made to him, and that such agreements as he might make on vital Union proposals which Ogle had long contested were preliminary in nature and subject to the Company's final approval or rejection. And this refusal to commit the Company at that time was recognized by the Examiner (J.A. 517; see also *Crown Drug Co.*, 136 N.L.R.B. No. 86, and *McLean-Arkansas Lumber Co., Inc.*, 109 N.L.R.B. 1022).

It followed that the resolution of the wage controversy and the making of a valid and unequivocal oral contract by the parties had to be found from the circumstances of the meeting of November 14, which Ogle attended even though the state of his health did not permit him to engage in protracted Union negotiations. As the Examiner stated "it is a major issue as to whether or not, at this meeting, the Respondent (the Company), in fact finally agreed to the wage rates" as demanded by the Union (J.A. 518). Whatever the actual words used by the various individuals at this meeting, Bilbrey, England and Lewis claimed to have construed them to mean that Ogle resigned himself to the inevitable and agreed to an increase in wages which would place the Company in a precarious financial

condition. It was this interpretation which the Examiner and the Board accepted in the face of the opposite conclusion on the part of Ogle as to what was said and what was meant, the concurrence with him of the remaining two Union representatives, Rivers and Wolski, and the only interpretation or determination which reason under the circumstances would permit.

The Examiner was forced to recognize, at the least, that

> Ogle was very reluctant to agree to the new wage rates despite the fact that his competitors had agreed to them, because he claimed that, unlike most of his competitors, his business was largely with hospitals, and that hospitals were not likely to accept an increase (J.A. 518).

It was not so much merely what Ogle "claimed" to be the case, however, as it was the actual facts of the case with respect to the possibility of the Company being able to pass along a wage increase to its customers, the bulk of whom were non-profit organizations with narrow income—disbursement margins. The peculiar position in which the Company found itself in this regard was certainly not unrecognized by the Union even after it had taken the position, so it rather incongruously stated, that the Company had consented to a wage increase without first ascertaining whether or not it could make up such an increase with its customers. And here lies the real crux of the matter: whether a Company could logically (or illogically) agree in November 1962 to sign a contract calling for a certain wage rate effective on January 1, 1963, and defer until after that date the matter of Union consent during that very month to an immediate reduction in the newly agreed upon wage rate. It was and it remains, completely unreasonable for the Union to wishfully think and the Examiner and the Board to unequivocally accept as fact that any Company would so conduct itself.

Apparently, the Examiner took at face value the stated recollection by Bilbrey, England and Lewis of Ogle's words to the effect that the Company would sign, but that if it did so the wage rates might well put it out of business. In any event, speculation as to whether Ogle actually intended to say and did say something very different, such as "if I sign, it might put me out of business" or, in another context, "so I sign and it puts me out of business" (See J.A. 92-93), is superfluous. For Ogle did state emphatically that he did not agree to the proposed wages and that, by consent of both sides, the matter would be left open for discussion at another meeting scheduled for January, 1963, pending the outcome of attempts by the Company to gain contract increases from its customers (J.A. 410 and 436-437).

Of decidedly more importance to an impartial observer than the conflicting testimony of the president and vice-president of the Union and a Union committeeman who was later discharged for lack of fitness, on the one hand, and the testimony of the President of the Company, on the other hand, is the testimony of Rivers and Wolski, both of whom were, along with Lewis, the duly elected and acting representatives of the Union rank and file. The testimony of each of these two men was unambiguous and unequivocal. There was no agreement as to wages, the one indispensable facet of the contract. Wolski answered the question put to him as to whether such an agreement was reached with an emphatic "NO" (J.A. 68-69). And Rivers, in reply to the same question recalled Bilbrey's demands to "sign the contract now and we'll talk about a wage differential sometime after the first of the year." At this proposal, Rivers was "kind of shocked", for, not unexpectedly, he could not readily see how the Company "was going to sign for one rate and later reduce it to another pay scale" (J.A. 83, 92). He might well

have added for emphasis, "within a few days after the new contract's effective date.

In the body of his Decision (J.A. 518) the Examiner merely mentioned the statements of Wolski and Rivers without comment and as if in passing. In a footnote at the bottom of the page however, he attacked those of Rivers with the rather ambiguous assertion that "River's testimony varied somewhat in quoting Bilbrey at different points in his testimony." If what the Examiner meant by this remark is that River's recollection at one point in his testimony as to Bilbrey's precise words did not exactly coincide with his recollection of those words at another point in his testimony, then he should hardly have been surprised at such variance in testimony given some six months after the event. The real significance of River's testimony, together with the testimony of Wolski, lies in the fact that their general sense was so clear and consistent throughout. They, more obviously so than any of the other conferees, had relatively little at stake in terms of personal interest, and their testimony cannot be said to have been colored by their eagerness to reach, with the aid of hindsight or otherwise, a particular result (unless it be on the side of the Union position). Let it also be remembered that they testified without first having talked with Ogle or without having his version before them (J.A. 77-78, 80). Ogle did not take the stand until the time of the second hearing more than five months later, but when he did so he related substantially the same facts as those previously testified to by Wolski and Rivers (J.A. 410-411). One might forget the exact words but he could hardly fail to recall the general thrust of so remarkable a proposal as that presented by Bilbrey, and accepted as a *fait accompli* by the Examiner and the Board.

By way of preface to the observation about the precise words used at the November 14, 1962 conference, the Examiner asserted (J.A. 518, fn. 5), that "both Rivers and Wolski turned against the Union in early 1963 and they were witnesses for the Respondent" (the Company). Whether this was meant to constitute some sort of indictment against the witnesses is not clear. It is certain that they were not at all satisfied with their relationship with the higher officials in the Union (J.A. 75; 90) and with the terms of the contract as proposed by them (J.A. 333-334; 342) and that as a consequence they attempted to institute decertification proceedings (J.A. 337-340).

But aside from the verbal testimony given at the hearings on both sides, there remains the singularly unassailable and unambiguous testimony of the simple fact that there was a meeting between the parties on January 7, 1963. For as Committeeman Rivers observed, the failure to agree on the wage rate at the meeting of November 14, 1962, was the "only reason" for scheduling a conference for January 7, 1963. "Everything else was acceptable in the contract" (J.A. 85). The lapse of time between the two dates was intended to permit the Company to contact its customers in an attempt to effect an increase in its charges to them. On January 7, 1963, Ogle reported that the Company had ben unable to obtain a modification in its contracts with its customers. The International Representative of the Union recognized the problem and promised to look into the matter so as to effect some relief from the local's demands. Ogle left the meeting in the firm belief that further conferences on the question would be held. And after Ogle's departure Dillon stated to the Union negotiators that unless the Company was given "some consideration in the wage area", it would not have "anything left to pay (its) bills" (See J.A. 70-71; 84-86, 94-96; 411). Not only is it against all reason to suppose that

the Company could agree to a certain level to be effective January 1, in hopes that the rate would be renegotiated downward on January 7, it is equally illogical to assume that a Union would agree to enter into a settled contract for announcement to its members while there existed even the remotest possibility that it would immediately thereafter be forced to announce a reduction. This the Examiner and the Board refused to consider. They found illogically and in the face of unequivocal testimony to the contrary that there was a meeting of the minds on November 14, 1962, and that thereafter the Company in declining to sign the so-called "Agreement" has violated Section 8(a) (5) and (1) of the Act.

In support of this position, a number of cases were cited, cases which, however valid for the general principles which they set forth, are not even remotely similar on the facts to the case at hand. As the United States Supreme Court said in *H. J. Heinz Company v. N.L.R.B.*, 311 U.S. 514, 526:

> The freedom of the employer to refuse to make an agreement relates to its terms in matters of substance and not, once it is reached, to its expression in a single contract, the absence of which, as experience has shown tends to frustrate the end sought by the requirement for collective bargaining.

The execution of a written contract is then merely the final step in the bargaining process. But it is clear that the parties must first have completed all the other steps. Thus, in the *Heinz* case, the employer refused to execute a written contract embodying terms which it actually stated it had orally agreed to in good faith. Similarly, in the other cases cited in support of the Board's position the party complained of admitted a refusal to sign after agreement had been reached; or after reaching an agreement

interposed extraneous conditions for execution or delivery of the contract; or exhibited a spirit of uncooperativeness and bad faith, and acted in a manner completely inconsistent with the purported reasons for not signing, as in unilaterally raising wages after pleading economic hardship; (see *Standard Oil Company v. N.L.R.B.*, 322 F 2d 40 (C.A. 6); *N.L.R.B. v. WATE, Inc.*, 310 F 2d 700 (C.A. 6); *N.L.R.B. v. Hyde*, 339 F 2d 568 (C.A. 9) and *N.L.R.B. v. Nesen*, 211 F 2d 559 (C.A. 9); or as in the case of *Lozano Enterprises v. N.L.R.B.*, 327 F 2d 814 (C.A. 9) upon agreeing to all the terms and executing the contract, stalled for time and planned to delay delivery until a threatened shutdown should materialize. While the Court noted that the Board may not be bound strictly by technical rules of contract law, nevertheless:

> We do not at all mean to hold that, in general the normal rules of offer and acceptance are not determined as to whether an agreement has been reached in a collective bargaining situation. We do hold that where, as in this case, the terms proposed by the Union are in fact acceptable to the employer, but delivery of the signed contract is withheld for the obvious tactical purposes that here appear, it is proper for the Board to conclude that there has been a failure or refusal to execute a written contract incorporating the agreement reached within the meaning of §8(d). (29 U.S.C. §158(d)).

In none of the cited cases were there present the emphatic denials of the Company that it had consented to all the substantial and indispensable terms of the "Agreement" on the part of its president, on the one hand and two of the negotiators for the Union, on the other. Nor were there present in any of those cases such uncontested evidence of circumstances which in and of themselves must preclude any thought of a valid agreement on the part of any reasonable person.

From the inability of the parties to arrive at a solution to the Company's problem with respect to its customers, it logically follows that the Company was within its rights to terminate the existing contractual relationship with the Union. This it did, in compliance with the extension agreement of July 10, 1962 by forwarding to the Union the requisite ten days' written notice of termination, effective January 28, 1963.

## REASONS FOR GRANTING THE WRIT

In its judgment affirming the determination of the Trial Examiner and the Board with respect to the contract issue the Court of Appeals nevertheless recognized the fact that "those present disagreed as to whether or not the parties agreed to a wage scale" (Opinion of the Circuit Court, p. 3), the single most important and indispensable facet of a collective bargaining agreement. It noted the testimony of Bilbrey, England and Lewis that Ogle assented to the Union's proposed wage scale in the face of his own stated belief that such a wage level might well cause the demise of the Company. It noted also the emphatic denials of Ogle and the two Union committeemen, Wolski and Rivers, that he, Ogle, had ever agreed to the Union proposals. The Court attempted to obviate the effect of the denials of Wolski and Rivers by adopting the Trial Examiner's tainted conclusion that they "turned against the Union in 1963 and were called as witnesses" by the Company. Further the Court merely mentioned in passing the salient factor of the scheduling by the parties of a meeting to discuss wages in the light of efforts to obtain a rate increase from its clients, which were to be made by the Company immediately after the occasion when it was alleged to have agreed upon a fixed wage scale.

By adopting the patently fallacious syllogism of the Trial Examiner and the Board, the Court has thereby sanctioned a startling departure from the long accepted principles of contract law. The cases previously cited by the Board failed to provide one instance in which a party was ordered to execute a written contract in the absence of an admission that it had agreed to the terms thereof or in the absence of circumstances from which such an admission might logically be inferred. *N.L.R.B. v. Ohio Car & Truck Leasing, Inc.*, 361 F 2d 404 (C.A. 6); *Stackhouse Oldsmobile, Inc. v. N.L.R.B.*, 330 F 2d 559 (C.A. 6) and *Standard Oil Company v. N.L.R.B.*, 322 F 2d 40 (C.A. 6), cited by the Court in its Judgment in support of the proposition that negotiating parties must incorporate in writing any agreement reached by them, involve, respectively, an agreement by the employer before a Federal Mediator and its subsequent execution of the contract after unilaterally inserting an amendment, an employer's refusal to sign a contract containing a Union Security clause which by its literal terms might require violation of Section 8 (a) (3) and Section 8 (6) (2) of the Act, and a union's refusal to sign an agreed upon contract pending the outcome of negotiations between another local at another employing unit of the employer.

In the instant case, where not only the employer, but also members of the Union's bargaining team emphatically denied the conclusion of an agreement on wages, and the parties scheduled a subsequent meeting to discuss the matter further, it cannot be said that there is substantial evidence of the meeting of the minds between the parties which is necessary for the formulation of a binding contract. The Act was manifestly not intended to deprive a negotiating party of its right to agree or disagree to a proposal on the part of the other. The Court has sanctioned and validated the dictation by an agency of the

United States of the terms of a contract to which by its own testimony and that of others on the Union's bargaining committee the Company never agreed.

## CONCLUSION

For the foregoing reasons, this Petition for writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

No. 16996

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

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|---|---|
| NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. OGLE PROTECTION SERVICE INC., and JAMES L. OGLE, an individual, *Respondent.* | ON PETITION for Enforcement of an Order of the National Labor Relations Board. |

Decided April 7, 1967.

Before: O'SULLIVAN and PHILLIPS, Circuit Judges and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. This cause is before the Court upon the petition of the National Labor Relations Board for enforcement of its order, issued November 6, 1964, against Ogle Protection Services, Inc. and James L. Ogle, the respondents herein. This Court has jurisdiction of the proceeding, the alleged unfair labor practices having occurred in Detroit, Michigan, within this judicial circuit. Section 160(e), Title 29, U.S.C. The Board determined that the respondents committed unfair labor practices in violations of Sections 158(a) (1), (3) and (5), Title 29, U.S.C.

Ogle Protection Services, Inc., hereafter referred to as respondent, is a Michigan corporation, engaged in the business of providing plant protection services for commercial establishments and hospitals. All of respondent's stock is owned by James L. Ogle, its president and general manager,

and his wife, a director of the corporation, but otherwise inactive in the business.

Since 1957, the International Union, United Plant Guard Workers of America, Local 114, hereafter referred to as the Union, has been the collective bargaining representative of respondent's employees. Benton Bilbrey and Willie England were president and vice president, respectively, of the local union. More than sixty days prior to the expiration, on July 15, 1962, of the then existing collective bargaining agreement, the Union sent respondent a notice of termination and a request to negotiate a new contract. After a preliminary meeting on July 9th, the parties on July 10, 1962, signed an agreement extending the contract indefinitely subject to termination at ten days written notice by either party.

At a meeting on August 14, 1962, Ogle agreed to all provisions of a new contract except those classified as "economic", which included holidays and holiday pay, insurance and wage scales. A third meeting on September 19, 1962, still did not produce agreement on the economic issues. Ogle, because of illness, cancelled two meetings which were scheduled to take place in early October. Bilbrey telephoned Ogle on October 9th and accused him of stalling. Ogle countered by saying that the union was trying to put him out of business. A strike vote was called on October 16th. Although a strike was authorized, it never took place. When Bilbrey telephoned Ogle on October 18th to resume negotiations, Ogle said that he was sick and that David Colman, an attorney, who had previously negotiated a contract with the Union for the respondent, would represent the respondent. Bilbrey testified that Ogle stated to him that Colman had full authority to negotiate the contract. Ogle never specifically denied making this statement, but repeatedly testified that he only called Colman in to assist him, and did not authorize him to agree to a contract.

A meeting was arranged and held on November 2, 1962, between Colman, Bilbrey and three employee committeemen. Coleman requested and the Union acceded to certain language changes in portions of the contract already agreed upon. With respect to certain Union requests Bilbrey

stated that Colman said that although he had full authority to reach an agreement, he felt that he should first consult with Ogle. Colman was never called to testify.

The next meeting was held at respondent's offices, with Bilbrey, England and the three committeemen representing the Union, and Colman and Ogle representing the respondent. The Union agreed to withdraw several proposals made at the previous session. Those present disagreed as to whether or not the parties agreed to a wage scale. Bilbrey, England and one committeeman testified that Ogle agreed to the new wage scale, "even though it might break him." The Union did agree at this time to another meeting in January in the event respondent could not shift the cost of the wage increase onto their customers. Ogle and the two other committeemen testied that everything but wages was agreed to and that they would meet again in January to discuss wages. These two committeemen turned against the Union in early 1963 and were called as witnesses by the respondent. The hearing examiner concluded that Ogle reluctantly agreed to a wage increase with the expectation that if he could not obtain corresponding increases from his customers, the scale would be lowered by subsequent negotiations. Bilbrey stated that having agreed to the terms it was decided that Colman would draw up the completed contract.

Bilbrey agreed to draft the contract, after being informed twice by Colman that the press of other work prevented him starting it. On December 11, 1962, the contract was completed with the exception of the insurance clause. Bilbrey called Colman and Colman dictated the clause to Bilbrey's secretary over the telephone. On the following day, Bilbrey sent six copies of the contract to Colman's office, and Colman agreed to have them signed by December 14th. Not having received them on the 14th, Bilbrey called Colman who said that other matters had prevented him from looking at them. Colman said he would study them over the weekend and would deliver them signed on Monday morning, December 18th. When he did not receive them on December 18, 1962, Bilbrey called Colman who said that he had proofread the contracts, found them satisfactory, would send them over to Ogle for signature and that Ogle

would deliver them to Bilbrey by the close of the day. At 9:30 that evening, Bilbrey called Colman at his home to inform him that he had not yet received the signed copies. Bilbrey had called a ratification meeting for the next morning. Colman was surprised that Bilbrey did not have the papers and told him to call back in an hour, Bilbrey did so and Colman said that Ogle promised to have the signed contracts at the union hall by nine o'clock the next morning, before the ratification meeting.

Even though the papers were not there as scheduled Bilbrey went ahead with the meeting, and those present voted to ratify. Following the meeting Bilbrey telephoned Ogle who said that his son had taken the copies to respondent's office by mistake. When Bilbrey accused Ogle of stalling again, Ogle replied, according to Bilbrey, "I'll tell you right now, I'm not going to go through with this agrement." Bilbrey replied that he believed there was a contract and was sending England to pick up the signed contracts. When England went to pick them up he was only given two copies, both unsigned: Ogle stated to England that he was glad that his son had made the mistake because now he was not going to sign them. Several subsequent meetings did not produce any change in the positions of the parties.

On January 18, 1963 Ogle sent the Union a ten-day notice terminating the interim agreement of July 10, 1962. Ogle testified that this notice was intended to be a total severance of all relations with the Union. Between February 4th and May 20, 1963, the Union sent five written grievances to the respondent by certified mail, all of which were returned unopened. On February 4, 1963, Ogle refused to process a grievance presented by a union committeeman stating, "As far ar we are concerned, we have no union."

On this state of the record the hearing examiner and the Board found that the respondent violated Section 158(a)(5) and (1), Title 29, U.S.C., by repudiating and refusing to sign a collective bargaining agreement reached earlier, and by refusing to recognize and negotiate with the Union concerning grievances after January 18, 1963. The Board ordered respondent to sign the agreement if requested by the Union, or, if no such request was made, to bargain

for a new contract, and to cease and desist from refusing to recognize and deal with the Union with respect to its employees' grievances.

Section 158(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, * * *." Section 158(d) states that included within the obligation to bargain collectively is "the execution of a written contract incorporating any agreement reached if requested by either party, * * *." Failure to execute and sign an agreement incorporating the terms of a negotiated contract is an unfair labor practice. *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514; *N.L.R.B. v. Ohio Car & Truck Leasing, Inc.*, 361 F.2d 404 (C.A. 6); *Stackhouse Oldsmobile, Inc. v. N.L.R.B.*, 330 F.2d 559 (C.A. 6); *Standard Oil Company v. N.L.R.B.*, 322 F.2d 40 (C.A. 6).

The scope of our review is limited to determining if the record contains substantial evidence to support the findings of the Board. Section 160(e), Title 29, U.S.C.; *Universal Camera Corporation v. Labor Board*, 349 U.S. 474; *Labor Board v. Denver Bldg. Council*, 341 U.S. 675. The credibility of witnesses is generally a matter for the determination of the hearing examiner and the Board. *Keener Rubber, Inc. v. N.L.R.B.*, 326 F.2d 968 (C.A. 6), cert. den. 377 U.S. 934; *N.L.R.B v Herman Bros. Pet Supply, Inc.*, 325 F.2d 68 (C.A. 6); *N.L.R.B. v. Bendix Corporation (Research Lab. Div.)*, 299 F.2d 308 (C.A. 6), cert. den. 371 U.S. 827. We conclude that there is substantial evidence in the record to support the Board's determination that respondent committed unfair labor practices in refusing to execute the contract and in refusing after January 18th to process union grievances.

* * * * *

(The balance of the Opinion is concerned with the allegedly discriminatory discharge of two employees of the Company and is not the subject of the within Petition.)

The Board's order is enforced except as to the portions ordering the reinstatement of Leeth and Lewis with back pay.

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# In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 321

OGLE PROTECTION SERVICE, INC., AND JAMES L. OGLE, PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17–21) is reported at 375 F. 2d 497. The decision and order of the National Labor Relations Board (J.A. 504a–559a)[1] are reported at 149 NLRB 545.

### JURISDICTION

The judgment of the court of appeals was entered on April 7, 1967 (Pet. App. 17). The petition for a writ of certiorari was filed on July 1, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." refers to the Joint Appendix filed in the court of appeals.

## QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer reached an agreement with the union on the terms of a collective bargaining contract, and, therefore, violated its bargaining obligation under the National Labor Relations Act by repudiating the agreement and refusing to embody it in a written contract.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition at pages 3–5.

## STATEMENT

### A. THE BOARD'S FINDINGS OF FACT

The Ogle Company is engaged in the business of providing plant protection services, and the Union[2] has been recognized as the bargaining representative of the Company's employees since 1957 (J.A. 511a, 513a). In May 1960, the parties entered into a one-year collective bargaining contract which was thereafter amended and extended to July 15, 1962 (J.A. 513a–514a; 447a–448a).[3] The Union gave due notice

[2] International Union, United Plant Guard Workers of America, and its Local 114.

[3] In November 1960, the Union filed unfair labor practice charges against the Company, which resulted in a settlement stipulation and the entry of a Board order in April 1961. That order required the Company, *inter alia*, to cease and desist from refusing to bargain with the Union over grievances and other contractual matters, and to designate a negotiator who would be available at reasonable times to deal with the Union. (J.A. 513a–514a.)

of its intention to terminate that contract and requested negotiations for a new agreement (J.A. 516a). The initial bargaining session was held on July 9, 1962, at which time the Union acceded to the Company's request for a recess of 30 days in order to study the Union's new proposals. In the meantime, the parties agreed to an indefinite extension of the existing contract, subject to termination by either party on 10-days notice. (J.A. 516a; 449a). The sole question raised by the petition is whether there is substantial evidence in the record to support the Board's finding that, in the subsequent negotiations, the Company actually agreed with the Union as to the terms of a new contract. The pertinent facts are as follows.

On August 14, 1962, the parties met again. The Union was represented by its president and vice-president, Benton Bilbrey and Willie England, and the Company was represented by its president, James Ogle. Ogle agreed to all of the Union's contract proposals except those classified as "economic," *i.e.*, those bearing on the wage scale, holidays, holiday pay, and insurance. The Union's demands included the same wage scale that it had already obtained from the Company's competitors. (J.A. 516a; 8a–9a.) A third meeting was held on September 19, but again no agreement was reached on the economic issues (J.A. 516a; 10a). Two subsequent meeting dates were cancelled by Ogle (J.A. 516a; 10a–11a). On October 9, Bilbrey telephoned Ogle and accused him of stalling; Ogle replied that the Union was trying to put him out of business (J.A. 516a; 11a). Thereafter, the employees

authorized the calling of a strike, and Bilbrey again requested Ogle to resume negotiations. Ogle replied that he was a sick man, but that his attorney, David Colman, who had negotiated and signed a prior bargaining agreement for the Company, would represent the Company in further negotiations. Ogle asserted that Colman had full authority to consummate an agreement. (J.A. 516a–517a; 11a–13a, 15a, 448a.)

On November 2, Bilbrey and three employee-committeemen met with Colman. Bilbrey informed Colman that the parties had already reached agreement on the noneconomic provisions of a new contract but agreed to Colman's request for certain changes in the language. The Union then demanded that the wage rate proposed by it be given effect as of November 1, 1962, and that the new contract have a three-year term. Colman requested that all new economic benefits be effective January 1, 1963, and that the new contract have a December 31, 1963, termination date. Colman further sought the deletion of an economic proposal calling for Company payment of certain license fees. The Union consented, provided that agreement were reached on the remaining proposals. The meeting ended when Colman said he had full authority to bind the Company but wanted to talk the matter over with Ogle first (J.A. 517a; 15a–19a.)

The parties convened again on November 14, with Colman and Ogle representing the Company, and Bilbrey, England, and the employee-committee representing the Union. At this meeting the Company acceded to the Union's economic proposals; the Union, in turn, agreed that the new contract would run only

from November 14, 1962, to December 31, 1963, and that the economic clauses would be effective as of January 1, 1963. Ogle's consent to the Union's wage proposal was given reluctantly. He contended that the Company's customers were mainly hospitals and that, therefore, it would be difficult to raise their rates to reflect the increased labor costs. Nevertheless, Ogle finally agreed to the wage increases, and the Union agreed to review the matter of wages in January if the Company were unsuccessful in its attempts to raise rates. It was also agreed that Colman would draft the completed agreement. (J.A. 517a–519a, 521a–522a; 10a, 20a, 50a, 410a, 437a.)

Between November 14 and December 5, Bilbrey telephoned Colman twice to ask if the contract had been drafted. Each time Colman replied that he had been too busy. Finally, Bilbrey offered to draft the agreement and Colman assented to this. By December 11, Bilbrey had completed the draft except for the insurance clause, and, on that day, Colman dictated the insurance clause to Bilbrey's secretary. On December 12, Bilbrey sent six copies of the complete contract to Colman, who agreed to proofread them and have them signed and returned by December 14. Bilbrey then sent notices to the employees informing them that a contract ratification meeting would be held on December 19. (J.A. 519a; 21a–23a, 45a–47a, 481a.)

When the signed copies were not returned as promised on December 14, Bilbrey called Colman, who said that he would take the agreement home over the weekend and return the signed copies on Monday, December 17 (J.A. 519a; 23a–24a). On December 18,

however, Bilbrey still had not received a signed copy and again called Colman. Colman said, "Well, I proofread them and everything is satisfactory, so I'll send them right over now to Mr. James Ogle's office for him to sign"; "they will be delivered to your office by closing time." (J.A. 519a; 24a.) That evening Bilbrey telephoned Colman and informed him that the contract had not been returned. Colman expressed surprise and asked Bilbrey to call back in an hour. When Bilbrey did so, Colman asserted that Ogle had promised to sign the copies and return them to the union hall by 9 a.m. in the morning, before the scheduled employee ratification meeting. (J.A. 519a–520a; 25a.)

Although signed copies were not delivered the next morning, Bilbrey held the meeting and read the agreement to the employees present who unanimously voted to ratify it (J.A. 520a; 25a). Bilbrey then telephoned Ogle who asserted that his son, by mistake, had taken the signed copies of the agreement to his office instead of the union hall. When Bilbrey responded angrily, Ogle said, "I'll tell you right now, I'm not going to go through with this agreement." (J.A. 520a; 25a–26a.) Bilbrey stated that as far as the Union was concerned the parties had an agreement and that he was sending Union Vice-President England over to pick up the promised signed copies. When England arrived at the Company, Assistant Manager Morrison handed him two unsigned copies of the agreement. England then spoke to Ogle who said he was glad that his son had mistakenly brought the agreement to his office because now he was not going to sign it. Ogle

refused to give England the other four copies of the agreement. (J.A. 520a; 26a, 54a.)

On January 3, 1963, Ogle asked Bilbrey for a meeting to discuss the contract. Bilbrey consented and requested Ogle to bring a signed copy of the contract. When the parties met on January 7, Ogle said he was having difficulty obtaining higher rates from his customers. The Union took the position that the parties had an agreement. A final meeting on January 30 produced no change in the parties' position. (J.A. 521a; 29a–31a, 34a–36a.)

### B. THE DECISIONS OF THE BOARD AND COURT OF APPEALS

Based upon the foregoing facts, the Board found that the Company had, in fact, reached a complete agreement with the Union on November 14, 1962, and that it therefore had violated Section 8(a) (5) and (1) of the Act by repudiating the agreement and refusing to embody it in a signed document (J.A. 521a–522a, 554a). The Board's order, *inter alia,* requires the Company to cease and desist from the unfair labor practices found, and, at the Union's option, either to execute the agreement reached on November 14, 1962, and give it effect until the next renewal date as provided in the agreement, or to bargain with the Union immediately for a new agreement. In the event that the Union elects the former alternative, the Board's order further requires the Company to make the employees whole for any losses suffered by reason of the Company's refusal to execute the agreement on November 14, 1962. (J.A. 506a–509a, 555a–559a.)

The court of appeals sustained the Board's findings and enforced its order in the foregoing respects (Pet. 17-21).[4]

## ARGUMENT

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," and Section 8(d) defines "to bargain collectively" as including "the execution of a written contract incorporating any agreement reached if requested by either party." Accordingly, it is settled law that an employer violates the Act if, after "reach[ing] an agreement with the Union concerning wages, hours and working conditions of the employees, [he] nevertheless refus[es] to sign any contract embodying the terms of the agreement." *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514, 523-526.[5] In this case the Company simply challenges the factual

[4] The court below also sustained the Board's findings that the Company violated Section 8(a) (5) and (1) of the Act by refusing to recognize and negotiate with the Union concerning grievances, on and after January 18, 1963 (Pet. 21). In its petition, the Company does not challenge this aspect of the court's decision.

The court set aside the Board's findings that the Company also violated Section 8(a) (3) and (1) of the Act by discharging two employees for engaging in union activities; accordingly, the court refused to enforce the portions of the Board's order based on such findings (Pet. 21).

[5] Accord; *National Labor Relations Board* v. *Warrensburg Board & Paper Co.*, 340 F. 2d 920, 921 (C.A. 2); *National Labor Relations Board* v. *Huttig Sash & Door Co.*, 362 F. 2d 217, 219 (C.A. 4); *National Labor Relations Board* v. *Wate, Inc.*, 310 F. 2d 700 (C.A. 6); *Lozano Enterprises* v. *National Labor Relations Board*, 327 F. 2d 814 (C.A. 9).

finding of the Board, sustained by the court of appeals, that it had actually come to an agreement with the Union (Pet. 7–12, 14–16). It challenges no more than the substantiality of the evidence, a matter which admittedly turns on the Board's assessment of the credibility of the witnesses (Pet. 7–10; see J.A. 517a–518a, 519a, n. 6), and does not warrant review by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502–503. In any event, the facts summarized in the Statement amply support the Board's finding that by November 14 the Company had reached complete agreement with the Union on the terms of a new contract.[6]

[6] Contrary to the Company's contention (Pet. 15), the element of assent necessary to establish a collective bargaining agreement, like any other contract, may be proved without showing an "admission." See 1 Corbin, *Contracts* § 18 (1963). Here the Company's assent was proved by Ogle's words at the November 14 meeting (*supra*, p. 5), by Colman's subsequent statement to Bilbrey that the draft of the agreement prepared by Bilbrey was "satisfactory" and would be signed (*supra*, pp. 5–6), and by the other probative evidence summarized in the Statement.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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